THE ROLE OF COMPARATIVE LAW IN STATUTORY AND CONSTITUTIONAL INTERPRETATION

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This article addresses the role of comparative law in the context of constitutional and statutory interpretation. More specifically, it deals with the normative question of whether courts can justify the ascription of a particular meaning to a constitutional or statutory provision by comparative reasoning, that is, by reasoning involving a reference to foreign law.

The practical relevance of this question was highlighted in *Printz v. United States*.[1] There, the Supreme Court had to decide whether a federal law that required state law enforcement officers to participate in the administration of a federally enacted regulatory scheme violated the Constitution. Justice Breyer, in his dissenting opinion, denied such a violation.[2] In support of this view, he pointed to the fact that in many other federal systems it is usual for state bureaucracies to execute federal statutes.[3] The Court, however, came to the opposite conclusion.[4] It based its decision on – among other things – an explicit rejection of comparative reasoning. "Such comparative analysis," Justice Scalia stated on behalf of the Court is, "inappropriate to the task of interpreting a constitution."[5]

The position adopted by the Supreme Court does not only correspond to the prevailing practice among U.S. courts, which rarely cite foreign law.[6]

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1. Printz v. United States, 521 U.S. 898 (1997).
2. *See id.* at 978 (Breyer, J., dissenting).
3. *See id.* at 976 (Breyer, J., dissenting).
4. *See id.* at 935.
5. *Id.* at 921 n.11.
6. *See*, David S. Clark, *The Use of Comparative Law by American Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS 297, 297 (Ulrich Drobnig & Sjef van Erp eds., 1999); Alain A. Levasseur, *The Use of Comparative Law by Courts*, *in* THE USE OF COMPARATIVE LAW BY COURTS 315, 316 (Ulrich Drobnig & Sjef van Erp eds., 1999); James A.R. Nafziger, *Thomas B. Stoel Inaugural Lecture: International and Foreign Law Right Here in the City*, 34 WILLAMETTE L. REV. 4, 20 (1998); Vernon Valentine Palmer, *Centennial World Congress on Comparative Law: Insularity and Leadership in American Comparative Law: The Past One Hundred Years*, 75 TUL. L. REV. 1093, 1094-96 (2001); *see also* Roscoe Pound, *The Influence of French Law in*

It also reflects the traditional view in the legal literature. U.S. scholars dealing with statutory or constitutional interpretation generally do not even mention foreign law as a factor to be considered in construing domestic statutes let alone the Constitution.[7] The only notable exception concerns the so-called "borrowed statute doctrine" which continues to be mentioned as a canon of interpretation.[8] This doctrine suggests that if the legislator copies a statute from another jurisdiction, the legislator can be presumed to have been aware of the construction given to that statute by the courts of that jurisdiction.[9] Hence, such constructions can be considered in interpreting the "borrowed" statute. At least in the past, this doctrine was not confined to cases in which states copied federal statutes or statutes from

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America, 3 ILL. L. REV. 354, 354 (1908-09).

7. *See, e.g.*, WILLIAM ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 211-328 (2000) (discussing various theories of interpretation as well as possible sources for the interpretation of statute without addressing the role of comparative law); ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO INTERPRETATION AND THE LEGISLATIVE PROCESS 1-56 (1997) (not mentioning comparative law in the context of statutory interpretation). The situation is similar with regard to German legal scholarship. Most of the existing treatises on legal interpretation do not mention comparative law. *See e.g.* WOLFGANG GAST, JURISTISCHE RHETORIK [LEGAL RHETORIC] 101-77 (1988); KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT [THE METHODS OF JURISPRUDENCE] 307-35 (5th ed., 1983); FRIEDRICH MÜLLER, JURISTISCHE METHODIK [LEGAL METHODS] 182-248 (4th ed. 1990). *But see* ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 239 (Ruth Adler et al. trans, Clarendon Press 1989) (1978) (suggesting that one can refer to foreign legal systems in order to show that the legal rule that would be brought about by a particular interpretation is apt to lead to undesirable consequences); MICHAEL SACHS, *EINFÜHRUNG [INTRODUCTION]*, *in* GRUNDGESETZ [BASIC LAW] 63 n.44 (Michael Sachs ed., 2d. ed. 1999) (suggesting that comparative law may play a role in constitutional interpretation and that this role may go beyond the search for legislative intent).

8. *See, e.g.*, William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 679 n.335 (2001); ESKRIDGE ET AL., *supra* note 7, at 283-84.

9. The exact understanding of this doctrine differs. Traditionally, the legislator was presumed to have silently incorporated the interpretation given by to the foreign statute by foreign courts. This left the courts with little room for maneuvering. *See, e.g.,* Interstate Commerce Comm'n v. Balt. and Ohio R.R. Co., 145 U.S. 263, 282 (1892) (suggesting that there is a presumption according to which Congress, in adopting the language of an English statute, had in mind the constructions given to the words of the statute by the English courts and intended to incorporate them into the statute). However, the more recent decisions of the Supreme Court have cast doubt on the scope of application of this presumption. Thus, in Shannon v. United States, 512 U.S. 573, 581 (1994), the Court refused to construe the Insanity Defense Reform Act of 1984 in accord with prior constructions of the District of Columbia statute upon which the Act was based, stating that the borrowed statute canon is "merely a 'presumption of legislative intention' to be invoked only 'under suitable conditions.'" This more flexible approach adopted by the Supreme Court reflects the now prevailing view in the legal literature. *See, e.g.,* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 131-36 (1975) (suggesting a "loose borrowed statute rule" according to which the local court may find it helpful in cases of uncertainty to examine the decisions of the state from which the statutory language was adopted).

other states.[10] Rather, it was also applied when a statute was "borrowed" from a foreign country.[11] While legal scholars do not always make it clear whether they consider the latter use of the borrowed statute doctrine to be legitimate, they do not explicitly reject it as illegitimate either.[12]

If one disregards the borrowed statute rule, however, most U.S. scholars have long failed to attach importance to comparative law in the context of legal interpretation.[13]

In recent years, however, the situation has changed profoundly. A considerable number of scholars have suggested that judges should look to decisions made by foreign courts when interpreting statutory or constitutional provisions.[14] Moreover, at least two Supreme Court Justices have indicated that they share this view.[15] This leads to the question of whether the use of comparative law in the context of legal interpretation can be justified from a theoretical point of view. Interestingly, even the advocates of comparative reasoning seem to have difficulties explaining why this question should be answered in the affirmative.[16] A recent article by Marc Tushnet may serve to illustrate this point.[17] In the said article, Tushnet addresses the question of whether it is legitimate for judges to rely on materials made available to them by comparative analysis in interpreting

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10. *See, e.g.*, Van Horn v. William Blanchard Co., 438 A.2d 552 (N.J. 1981).

11. *See, e.g.*, *Interstate Commerce Comm'n*, 145 U.S. at 282.

12. *See, e.g.*, ESKRIDGE ET AL., *supra* note 7, at 283-84.

13. *But see* United States v. Then, 56 F.3d 464, 468-69 (1995) (Calabresi, J., concurring) (the famous statement by Judge Calabresi according to which the United States, having helped spawn a new generation of constitutional court around the world, should consider the law of other countries, because "wise parents do not hesitate to learn from their children.").

14. *See* Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 286-92 (1997); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 889-91 (1999); H. Patrick Glenn, *Centennial World Congress on Comparative Law: Comparative Law and Legal Practice: On Removing the Borders*, 75 TUL. L. REV. 977, 986 (2001); Ulrich Drobnig, The Use of Comparative Law by Courts, *in* THE USE OF COMPARATIVE LAW BY COURTS 3, 19-21 (Ulrich Drobnig & Sjef van Erp eds. 1999); Kathryn A. Perales, *It Works Fine in Europe, So Why Not Here?: Comparative Law and Constitutional Federalism*, 23 VT. L. REV. 885, 897-907 (1999); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 13-14 (1996); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1238 (1999).

15. *See* Printz v. United States, 521 U.S. 898, 976-78 (1997) (Breyer, J., dissenting); Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, INT'L JUD. OBSERVER, June 1997, at 2-3.

16. It is striking that even those scholars who discuss the role of comparative reasoning in the context of interpretation give only very limited space to the question of legitimacy. *See, e.g.*, Choudhry, *supra* note 14, at 889-91; Drobnig, *supra* note 14, at 19 – 21; Perales, *supra* note 14, at 897-907.

17. *See* Tushnet, *supra* note 14, at 1238.

the Constitution, a process he describes as "bricolage." Tushnet gives the following answer: "Perhaps we can take the sting out of the question without quite offering a positive justification for bricolage. Often bricolage is an unconscious process: Picking up a piece from somewhere just seems like a natural thing to do."[18]

This article argues that comparative law can legitimately be used as a standard tool in the context of legal interpretation. Part I establishes a terminological framework for the analysis undertaken in this article. Part II examines existing attempts at justifying the use of comparative arguments in legal interpretation. It is shown that the approaches in question can only legitimize the use of comparative law in specific circumstances but fail to provide a general basis for the use of comparative reasoning. Part III identifies possible objections to the legitimacy of comparative justification. To do so, it analyzes both the relevant literature and the pertaining decisions of the Supreme Court. Part IV makes use of Jürgen Habermas' discourse theory to provide a general justification for comparative reasoning in the context of interpretation. Part V develops this justification in more detail and shows that this approach can avoid not only possible objections derived from discourse theory itself but also the general objections to comparative reasoning identified in Part III. Part VI summarizes the preceding parts.

I. THE TERMINOLOGICAL FRAMEWORK

As mentioned above, this article deals with the question of whether courts can justify their interpretation of a particular constitutional or statutory provision by comparative reasoning. Given that the terms "interpretation," "justification," and "comparative reasoning" are, of course, ambiguous, it appears useful to begin by clarifying these concepts. [19]

A. INTERPRETATION

The term "interpretation" will be used in only one way, namely to denote the attribution of a specific meaning to a constitutional or statutory provision.[20] By "attribution of a meaning" I mean the claim that the relevant provision has the meaning in question.

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18. *Id.* at 1237-38.

19. *See, e.g.*, JERZY WRÓBLEWSKI, MEANING AND TRUTH IN JUDICIAL DECISION 72-74 (2d ed., 1983) (describing various meanings of the term interpretation).

20. This use of the word interpretation is fairly common. *See, e.g.*, ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 13 (1992).

Understood in this way, the interpretation of a statute must be distinguished from two other phenomena that are frequently termed "interpretation." First, interpretation in the above-defined sense should not be confused with the *reasoning* advanced by an interpreter to explain why he believes that a particular interpretation is the right one. Second, it is necessary to distinguish between the claim that a certain provision has a particular meaning ("interpretation") and the psychological process of deciding which meaning to attribute to the provision in question.[21] In accordance with some of the existing literature, the latter phenomenon shall be referred to as "discovery."[22]

This said, one could rephrase the question addressed in this article as follows: Can courts justify their claim that a statutory or constitutional provision has a certain meaning by means of comparative reasoning?

B. JUSTIFICATION

This leads to the question of what is to be understood by the justification of an interpretation. In the context of this article, the term will be used in the sense of showing that a particular interpretation is (likely to be) the right one. Several aspects of this definition need to be explicated.

First, the definition described above is not meant to imply that there necessarily is only one right interpretation.[23] Consequently, a showing that the chosen interpretation is one of several right ones would still be covered by the term justification as defined above.

Second, the term justification shall not be restricted to those cases where the rightness of an interpretation is proven in a logically compelling way.[24] Rather, it shall be applied to all those arguments that increase the

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21. The definitions of interpretation given by U.S. scholars often evoke this psychological process. *See e.g.* MIKVA & LANE, *supra* note 7, at 6 (defining statutory interpretation as "a search for legislative meaning in the context of the particular question before the court.").

22. *See, e.g.*, BRUCE ANDERSON, DISCOVERY IN LEGAL DECISION-MAKING 1 (1996); RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 27 (1961).

23. Consquently, there is no need to enter the debate on whether legal questions usually have one right answer. *Cf., e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985); RONALD DWORKIN, LAW'S EMPIRE 266 (1986) (answering this question in the affirmative).

24. Scholars generally agree that it is not always possible to provide compelling proof that a particular interpretation is correct. *See, e.g.*,DWORKIN, LAW'S EMPIRE, *supra* note 23, at viii-ix. (even Dworkin, according to whom there usually is not more than one right answer even in hard cases, distinguishes carefully between the rightness of an answer and the possibility to prove this rightness conclusively:

> I have . . . argued for many years against the positivist's claim that there cannot be "right" answers to controversial legal questions, but only "different" answers; I have insisted that in most hard cases there are right answers to be hunted by reason and

likelihood that a particular interpretation is the right one. For example, if one believes that courts should consider both the intent of the legislator and the plain meaning of the text, a court can justify a decision by textualist arguments, even if it may be necessary to complement these textualist arguments by an inquiry into the legislative history of the statute.

Third, the definition described above is to be understood in a normative rather than descriptive sense. A court's efforts to show the rightness of its decision may or may not amount to a justification, depending on whether the court's argument make it seem more likely that the interpretation chosen by the court is the right one.

Fourth, the term justification in the above-mentioned sense only presupposes a showing that an interpretation *is* (likely to be) the right one. By contrast, a justification need not explain what *makes* a certain interpretation the right one. The role of persuasive authorities in legal reasoning may serve to illustrate the difference. Assume that a textualist approach to statutory interpretation is correct. Assume further that court A which follows a textualist approach to statutory interpretation deservedly enjoys a reputation for making decisions that are correct from a textualist point of view, and that, therefore, courts in other states usually attain correct results if they follow the (non-binding) precedents set by court A. In this case, the fact that another court's decision corresponds to a precedent set by court A *indicates* that the other court's decision is probably right. However, it would be wrong to say that the correspondence to the relevant precedent is what *makes* the interpretation right. Rather, the interpretation chosen by court B is the right one because it corresponds to the text of the statute.

C. COMPARATIVE REASONING

This leaves the necessity to define what is meant by "comparative reasoning." As indicated above, I wish to include any reasoning that somehow refers to foreign law. However, this broad definition of comparative reasoning should not distract from the fact that an interpreter can use comparative law in various ways to justify a particular interpretation. The question of legitimacy can be a different one for each

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imagination. Some critics have thought I meant that in these cases one answer could be *proved* right to the satisfaction of everyone, even though I insisted from the start that this is not what I meant, that the question whether we can have reason to think an answer right is different from the question whether it can be demonstrated to be right.)

Id.

of these different uses of comparative law.[25] Hence, it seems useful to distinguish terminologically between certain types of uses. Without aiming at completeness, I wish to briefly sketch four of these possible uses. The first three concern the use of comparative law as a means to ascertain certain traditional criteria of legal interpretation, whereas the fourth is marked by its independence of these traditional criteria.

In the context of legal interpretation, scholars traditionally resort to the intent of the legislator, the purpose of the statute, the plain meaning, or to pragmatic considerations.[26] Comparative law can be made part of the relevant arguments.

Most importantly, comparative law can be used to evaluate the likely consequences of a specific legal interpretation. I will refer to this as "evaluative comparisons." Such "evaluative comparisons" can then be used as part of a purposivist or pragmatic argument. A typical example for the latter can be found in *Flora v. United States*.[27] There, one of the legal questions was whether 28 U.S.C.S. § 1346(a)(1) required the taxpayer to pay fully his assessment before he could maintain a refund suit in a federal district court.[28] The Supreme Court answered the question in the affirmative.[29] One of the reasons it offered was that the alternative "[c]onceivably . . . could cause the chaotic tax collection situations which exist in some European countries"[30]

Moreover, comparative law can be used to ascertain the intent of the legislator. This will be referred to as "intentionalist comparisons." In

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25. The idea that comparative law can be used in different ways in the context of interpretation is not new. *See e.g.*, Choudhry, *supra* note 14, at 825, 833-85 (distinguishes between three different modes of using comparative law in constitutional interpretation: the universalist interpretation according to which constitutional courts have to apply the same set of universal and preconstitutional principles, the genealogical interpretation that is based on the historical relationship between different constitutions, and the dialogical interpretation according to which courts can " identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions"). The problem with Choudhry's approach is that it does not distinguish sufficiently between use and justification. For example, the "universalist" interpretation is not really a "use" of corporate law, but rather a common way of giving justifying the use of corporate law.

26. *See* ESKRIDGE ET AL., *supra* note 7, at 211-248.

27. Flora v. United States, 362 U.S. 145 (1960); *See also* New York v. United States, 326 U.S. 572 (1946). Justice Frankfurter, writing for the Court, analyzed the question whether Congress had the right to tax the state of New York on its sale of mineral water. Arguing that it was not possible to separate manifestations of indivisible governmental powers, Justice Frankfurter pointed out that corresponding "attempts to solve kindred problems arising under the Canadian and Australian Constitutions had proved to be a barren process." *Id.* at 583 n.5.

28. *See Flora*, 362 U.S. at 146.

29. *See id.* at 177.

30. *Id.* at 176 n.41.

practice, such comparisons are particularly common in cases where the borrowed statute doctrine applies, i.e., in cases where a statute has been modeled after another country's law.[31] For example, in *Interstate Commerce Comm'n v. Balt. and Ohio R.R. Co.*[32] the Supreme Court justified its interpretation of § 3 of the Interstate Commerce Act as follows:

> The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act.... [I]t may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute.[33]

Similarly, comparative law can be used to discover the plain meaning of a term used in a statutory or constitutional provision. I will refer to this as "textualist comparisons." Consider, for example, the above-cited decision *Interstate Commerce Comm'n* . If one adopts a purely textualist approach to legal interpretation, the fact that the legislator intended to incorporate the language of the English statute may not be relevant. But one could still argue that the construction given to the English statute by the English courts indicates the common meaning that the relevant terms had at the time when the Interstate Commerce Act was created.

Finally, comparative law can be used as an independent mode of reasoning. By "independent" I mean a form of reasoning that does not implicitly or explicitly refer to one of the above-mentioned traditional criteria of legal interpretation.[34] In other words, foreign statutes or decisions by foreign courts are *per se* advanced as arguments in favor of or against a particular interpretation. The court's argument then takes the following form: One reason for choosing interpretation A is that courts in the country X have interpreted a similar statute in X to mean A. I shall refer to the relevant arguments as "authority-based comparisons." A

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31. *Cf.* Interstate Commerce Comm'n v. Balt. and Ohio R.R. Co., 145 U.S. 263 (1892) and Shannon v. United States, 512 U.S. 573 (1994).

32. Interstate Commerce Comm'n v. Balt. and Ohio R.R. Co., 145 U.S. 263 (1892).

33. *Id.* at 282, 284 (citation omitted).

34. The expression "criteria of interpretation" is frequently used in German legal scholarship. *See, e.g.*, LARENZ, *supra* note 7, at 307. Admittedly, the expression is somewhat vague. However, there is no obvious alternative. *See, e.g.*, ESKRIDGE ET AL., *supra* note 7, at 211 (suggesting a distinction between "the overall goal of interpretation" and "the admissible sources the interpreter may consider" in achieving that aim.). However, the notion "goal" is even more vague than that of criterion. One may find it necessary to consider the language of the statute in order to discover the plain meaning of the text in order to discover the intent of the legislator in order to realize the principle of democracy in order to realize justice. While the language of the statute clearly represents a source in the above-mentioned sense, all of the other elements can be called "goals" of interpretation.

typical example for such reasoning can be found in *Sandoval v. Calderon.*[35] There, the Court of Appeals for the Ninth Circuit had to address the question of whether the Establishment Clause of the First Amendment made it illegal for the prosecutor in a criminal case to invoke biblical teachings to persuade a jury.[36] The Court answered the question in the affirmative.[37] One of the arguments it advanced in favor of this interpretation was that "[U.S.] courts are not alone in rejecting religious argument. The Ontario Court of Appeal has as well. The Canadian Constitution does not recognize the separation of church and state . . . . Yet the Canadian court found counsel's references to Biblical stories to be 'inappropriate in the extreme'"[38]

II. EXISTING ATTEMPTS TO JUSTIFY THE USE OF COMPARATIVE LAW

In the existing literature, a variety of arguments are advanced in favor of the use of comparative law in legal interpretation. In my view, these arguments suffice to establish the legitimacy of evaluative, intentionalist, and textualist comparisons. However, as shown below, the general legitimacy of authority-based comparisons has not yet been established in a convincing way.

For evaluative purposes, it is useful to divide the existing arguments relating to comparative reasoning into three categories: (1) arguments that do not concern the level of justification at all, (2) arguments that refer to the use of comparative law within the framework set by the traditional criteria of legal interpretation, and (3) arguments referring to authority-based comparisons.

A. ARGUMENTS REGARDING THE PROCESS OF DISCOVERY

Some of the arguments advanced in favor of using comparative law in the context of interpretation do not concern the justification of interpretation at all. Rather, they only apply to the process of discovery.

In particular, it has been argued that the use of comparative law can inspire the interpreter to find the interpretation that is best with regard to his own country's law.[39] For example, the study of foreign law may

35. Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000).
36. *See id.* at 775-76.
37. *See id.*
38. *Id.* at 777 (citation omitted).
39. Perales, *supra* note 14, at 902.

provide the interpreter with new ideas.[40] Similarly, foreign law may contribute to the interpreter's understanding of the statute he has to interpret.[41] These arguments, while aiming at justifying the use of comparative law, do not claim that the interpreter can show the rightness of his interpretation by referring to foreign law.

The same is true with regard to the argument that foreign law can be used as an aid in interpreting statutes when the texture of law contains gaps. For example, in *The Concept of Law*, H. L. A. Hart suggests that "the judge, [w]here he considers that no statute or other formal source of law determines the case before him . . . may base his decision on e.g. . . . the writings of a French jurist."[42] This line of reasoning provides an explanation why it is legitimate for an interpreter to rely on foreign law in deciding which meaning to attribute to a statutory or constitutional provision. However, the approach described above does not use the reference to foreign law in order to show which interpretation is the right one. Rather, the very opposite is true. The interpreter can allow himself the luxury to be inspired by foreign law, precisely because the interpretation suggested by foreign law has already been established to be one of several right ones.

B. COMPARATIVE REASONING AS PART OF TRADITIONAL ARGUMENTS

In the United States, as in other countries, there exists a standard set of criteria that are frequently referred to when it comes to justifying the interpretation of a statutory or constitutional provision. These criteria particularly include the plain meaning of the words of the statute, the intent of the legislator, the purpose of the statute, and – pragmatically – the desirability of the consequences that are likely to result from a particular interpretation.[43] While each of these criteria may be subject to criticism, an

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40. *See, e.g.*, MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 4 (1989); RENE DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 16 (2d ed. 1978); Nafziger, *supra* note 6, at 25; Perales, *supra* note 14, at 902; Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 350-60 (1998); George A. Zaphiriou, *Use of Comparative Law by the Legislator*, 30 AM. J. COMP. L. 71, 95 (1982) (suggesting that international comparison is used by the legislator to provide ideas for the introduction of new legislation). *See* O'Connor, *supra* note 15, at 2-3.

41. *See, e.g.*, DAVID & BRIERLEY, *supra* note 40, at 6; GLENDON, *supra* note 40, at 4; Perales, *supra* note 14, at 902; Schadbach, *supra* note 40, at 344-351.

42. H.L.A. HART, THE CONCEPT OF LAW 246 (1961).

43. With regard to the United States see *e.g.*, ESKRIDGE ET AL., *supra* note 7, at 211-48. According to German legal doctrine, the traditional criteria of interpretation include plain meaning, purpose, legislative intent, and the coherence of the legal system. *See, e.g.*, GAST,

extensive body of legal scholarship aims at establishing their legitimacy,[44] and many scholars – in the United States as well as in other countries – consider it legitimate to base an interpretation on all of these criteria.[45]

Most of the arguments advanced in favor of the use of comparative law in interpretation simply amount to the assertion that comparative law can be used as a means to ascertain facts that are relevant with regard to the above-mentioned traditional criteria of legal interpretation. For example, it has been suggested that by undertaking international comparisons, courts can make use of experiences made in other countries and thereby avoid the mistakes committed in these other countries.[46] In essence, this argument simply points out that there is no reason not to assess the likely consequences of a certain interpretation by means of evaluative comparisons. Similarly, it has been argued that the use of comparative law is legitimate because it can shed light on the intent of the legislator.[47]

In principle, this way of legitimizing the use of comparative law is plausible. Once it has been established that a certain criterion, such as the intent of the legislator, can legitimately be used to justify an interpretation, the burden of persuasion shifts to those who want to exclude specific ways of ascertaining the relevant factor. The opponents of comparative reasoning have not met this burden.

C. AUTHORITY-BASED COMPARISONS

Only two explanations seem to have been offered as to why authority-

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supra note 7, at 101-77; LARENZ, *supra* note 7, at 307-335; FRIEDRICH MÜLLER, JURISTISCHE METHODIK [LEGAL METHODS] 182-248 (4th ed. 1990).

44. For an intentionalist theory of legal interpretation *cf.*, *e.g*, MARMOR, *supra* note 20 (arguing that legislative intent should be the goal of statutory interpretation); Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 814-15 (1994) (arguing, on grounds of democratic theory, for an intentionalist theory of interpretation). For a textualist approach to statutory interpretation see, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); John Manning, *Textualism as a Non-delegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Jerry Marshaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes,* 32 WM. & MARY L. REV. 827 (1991); For a purposivist approach confer, e.g., HENRY HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374-80 (William Eskridge, Jr. & Philip Frickey eds., 1994).

45. As regards the United States, *cf. e.g.*, William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (arguing that unitary theories of interpretation will necessarily fail). With regard to Germany *cf.* GAST, *supra* note 43, at 101-77 (1988); LARENZ, *supra* note 7, at 307-335; MÜLLER, *supra* note 43, at 182-248.

46. *See* Perales, *supra* note 14, at 902. *See also* Clark, *supra* note 6, at 314.

47. *See, e.g.*, Drobnig, *supra* note 14, at 20; Perales, *supra* note 14, at 902.

based comparisons might be legitimate. The first one of these explanations regards the uniformity of laws; the second one is based on a specific theory of natural law.

1. The Uniformity of Laws

It has been suggested that the uniformity of laws is a desirable aim of legal interpretation.[48] Against this background, it is possible to argue that comparative justification is legitimate, because in choosing an interpretation that corresponds to the law in other countries, the interpreter can increase the degree of uniformity. The main problem with this concept concerns its assumption that the uniformity of laws is generally desirable. The only reason advanced in favor of this view is that uniform laws are more efficient.[49] However, given that regulatory competition is more and more recognized as beneficial,[50] the efficiency-thesis is unconvincing. Moreover, it is much easier for the legislator than it is for the courts to increase the uniformity of national or at least state laws. If the legislator of a particular state or country chooses not to do so, it is not clear why the courts should have a mandate to promote the uniformity of laws.

Of course, this leaves the possibility that in certain cases, the uniform interpretation of national laws can be legitimate. In particular, one can plausibly argue that uniform laws should generally be interpreted in a uniform manner.[51] Otherwise, the uniformity achieved by means of legislation would be lost in the process of application. However, uniform statutes are the exception, and consequently, the uniform law argument fails to support the general use of authority-based comparisons.

48. Perales, *supra* note 14, at 903. *Cf. also* Zaphiriou, *supra* note 40, at 95 (suggesting that expanding international trade and business, the need to comply with international standards makes the increasing use of comparative law indispensable).

49. *Cf.* Perales, *supra* note 14, at 903 (pointing to the "continued influx of immigrants in great numbers" as well as to the fact that foreign businesses and citizens are intricately connected to all aspects of the United States).

50. The economic and legal literature praising the benefits of regulatory competition is immense. For an overview, *cf.* ALBERT BRETON, COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE (1996); William W. Bratton et al., *Introduction: Regulatory Competition and Institutional Evolution*, *in* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 1 (William W. Bratton et al.eds., 1996); Wolfgang Kerber, *The Deregulation of Globalizing Markets: Interjurisdictional Competition within the European Union*, 23 FORDHAM INT'L L.J. 217 (2000).

51. *See, e.g.*, Drobnig, *supra* note 14, at 20.

2. Natural Law

It has also been suggested that the concept of natural law might serve as a justification for authority-based comparisons.[52] The reasoning underlying this view can be summed up as follows. There exists a natural law in the sense of an absolute standard of justice. This natural law should influence the interpretation of positive law. Furthermore, all civilized countries try to adopt the best and most just legal rules. Therefore, all legal systems represent approximations of natural law. Consequently, if several countries have adopted the same or similar rules, this uniformity is likely due to the fact that the relevant rules represent a fairly close approximation of natural law. By interpreting one's own law in accordance with these rules, therefore, one is likely to bridge or at least narrow the gap between positive and natural law.

This article cannot attempt to address the general question of whether one should subscribe to the idea of natural law.[53] However, even if one were to subscribe to the view that natural law exists and should be considered in interpreting statutes, the argument described above is open to critique.

The first objection regards the argument's scope of application. The natural law argument could only establish the general legitimacy of authority-based comparisons if every legal question or at least most legal questions could be determined by reference to natural law. Yet even those who adhere to the idea of natural law do not claim that there is a pre-legal system of natural law norms that is equally rich in detail as positive legal systems.[54] Consequently, the natural law argument is at best plausible with regard to those legal questions for which natural law arguably holds an answer. One may, for example, think of questions regarding human rights.[55]

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52. *See, e.g.*, Perales, *supra* note 14, at 904-05, 907. *Cf. also* Choudhry, *supra* note 14, at 843, 889-891 (describing this approach but acknowledging that the daring assumptions on which it is based make this line of reasoning vulnerable to critique); Levasseur, *supra* note 6, at 316 (hinting that courts might use comparative law as a possible source of natural law).

53. From the vast literature dealing with this question see, e.g., Robert P. George, *A Defense of the New Natural Law Theory*, 41 AM. J. JURIS. 47 (1996), *Stephen D. Smith, Natural Law and Contemporary Moral Thought: A Guide for the Perplexed*, 42 AM. J. JURIS. 299 (1997).

54. The idea that natural law does not prescribe every detail of positive law is not of recent origin. Thus, Thomas Aquinas argued that while positive law is derived from natural law, natural law sometimes leaves room for human choice. *See* St. Thomas Aquinas, *Summa Theologiae, in* THE TREATISE ON LAW (R. J. Henle trans. & ed., 1993), Question 95, art. 2, corpus.

55. *Cf., e.g.*, JOHN FINIS, NATURAL LAW AND NATURAL RIGHTS (1980). *But see* Perales, *supra* note 14, at 907 (arguing that even commercial law can be part of natural law). Perales relies on the argument that in the past the natural law idea was used to justify the reference

The second objection regards the assumption that a convergence of several legal systems towards a specific legal rule indicates a narrowing gap between natural and positive law. It hardly needs to be pointed out that historically, legal systems have often converged towards standards that would now be considered in violation of natural law. The appearance of fascist regimes in Europe, the legality of slavery, or the exclusion of women from the democratic vote are obvious examples. Hence, the mere fact of converging legal rules seems a fragile basis for the assumption that the rules in question approach the ideal of natural law.[56] The argument becomes more plausible if one stresses procedural aspects: If one assumes that democratic and legal procedures meeting a certain standard of fairness are apt to lead to desirable laws, then, indeed, the fact that a variety of such procedures have produced a certain rule can indicate the desirability of this rule. Viewed in this way, the common acceptance of a certain rule might be a sign of its desirability. However, this line of reasoning has little to do with the argument described above. First, the procedural argument does not presuppose a natural law theory. A rule can be efficient and therefore universally desirable, even if natural law does not exist. Second, any procedural justification of the use of comparative law cannot focus on the convergence of legal rules alone, but will have to take into account additional aspects. In particular, any such approach will have to consider to what degree rules in other countries are the result of a fair parliamentary or judicial procedure.[57] It will also have to take into consideration to what degree certain rules in converging rules of other nations are the expression of particular preferences common only to these nations. These aspects will be discussed more thoroughly below in the context of an alternative justification for comparative justification.

French and Dutch authorities in the field of commercial law.However, the fact that U.S. courts used the concept of natural law to defend a certain practice says little about whether they were justified in doing so.

56. *Cf.* Choudhry, *supra* note 14, at 890 - 91 (referring to the argument that moral and political values are relative to specific cultural contexts).

57. It is interesting, in this context, to consider a view advanced by HART & SACKS, *supra* note 44, at 1379, with regard to agency interpretations. According to Hart and Sacks "[a]n administrative or popular construction is relevant for different reasons. Such construction affords weighty evidence that the words may bear the meaning involved. *In the absence of reasons of self-interest or the like for discounting the construction,* it is persuasive evidence that the meaning is a natural one." *Id.* (emphasis added). As the quoted passage shows, Hart and Sacks make it clear that in order to rely on an agency interpretation as persuasive evidence it may be necessary to make sure that the procedure followed by the agency met certain standards. The same idea can be applied to decisions by foreign courts.

D. SUMMARY

In sum, while the legitimacy of comparative reasoning is relatively easy to defend as long as comparative arguments are made as part of traditional interpretive arguments, the existing literature fails to give a plausible justification for the general use of authority-based comparisons.

III. OBJECTIONS TO COMPARATIVE REASONING

The limitations of existing justifications for authority-based comparisons give rise to the question of whether an alternative justification for such comparisons can be found. It is useful, in this context, to start by examining possible objections to the legitimacy of comparative justification. If these objections turn out to be plausible, any attempt to justify authority-based comparisons would have to avoid them.

This Part begins by analyzing the objections raised by the Supreme Court against the use of comparative law in legal interpretation. It then examines those arguments against comparative reasoning that are advanced in the literature. Finally, it addresses a potential problem that is neglected both by the Supreme Court and by the relevant literature, namely the problem of consistency.

A. THE OBJECTIONS TO COMPARATIVE JUSTIFICATION RAISED BY THE SUPREME COURT

The U.S. Supreme Court, while constantly faced with the possibility to consider foreign law in constitutional or statutory interpretation, does not usually give reasons why it considers comparative reasoning to be appropriate or inappropriate. However, in two comparatively recent decisions, *Stanford v. Kentucky* and *Printz v. United States*, the Court explicitly addressed the role of foreign law in constitutional interpretation.[58] In both cases, the Court adopted a critical attitude towards the use of comparative law.

1. Stanford v. Kentucky

In *Stanford* committed by 16 the Supreme Court had to decide whether the imposition of capital punishments for murders and 17 year olds constitutes cruel and unusual punishment in the sense of the Eighth

58. *Cf.* Stanford v. Kentucky, 492 U.S. 361, 369–70 n.1 (1989); Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

Amendment.[59] In an earlier decision, *Trop v. Dulles*,[60] the Court had held that in deciding what constitutes cruel and unusual punishment, judges must be guided by "the evolving standards of decency that mark the progress of a maturing society."[61] In *Stanford*, the Court addressed the question of whether these standards of decency were to be determined from a purely national or from an international perspective.[62] Citing his own dissenting opinion in *Thompson v. Oklahoma*, Justice Scalia, writing for the court, emphasized that "it is American conceptions of decency that are dispositive" and that "the sentencing practices of other countries are [not] relevant."[63]

As I read the decision, *Stanford* does not directly address the question of whether comparative reasoning is legitimate in the context of constitutional interpretation.Instead, the decision deals with the question of whether a certain term used in the Constitution, namely "cruel and unusual punishment" should be interpreted in such a way as to refer to international standards of decency. In other words, the court does not reject a particular method of justification. Rather, it rejects one interpretation of "cruel and unusual" in favor of another. Even in the context of the Eighth Amendment, therefore, the decision does not necessarily imply a general rejection of comparative reasoning. This becomes evident if one considers the following possibility. Theoretically, the Supreme Court could have justified the decisiveness of American standards of decency by arguing that similar provisions in the constitutions of other western nations are all interpreted to refer to national standards of decency. In this case, the Supreme Court would have justified the same result by engaging in authority-based comparisons.

Nevertheless, the reasoning behind the Supreme Court's decision is relevant to the question of whether comparative reasoning is legitimate. While the Court does not explicitly list any arguments against the decisiveness of international standards of decency, it refers to the reasoning in Justice Scalia's dissent in *Thompson v. Oklahoma*.[64] There, Scalia argues that the Court "must never forget that it is the Constitution of the United States that [it is] expounding . . . . [T]he views of other nations, however enlightened the Justices . . . may think them to be, cannot be imposed upon

59. *Stanford*, 492 U.S. at 368.
60. Trop v. Dulles, 356 U.S. 86 (1958).
61. *Id.* at 101.
62. *Stanford*, 492 U.S. at 369 and 370 n.1.
63. *Id.*at 369-70 n.1. *See also* Thompson v. Oklahoma, 487 U.S. 815, 868-869 n.4 (1988).
64. Thompson v. Oklahoma, 487 U.S. 815, 869 (1988).

Americans through the Constitution."[65]

The first part of this passage, namely the argument that it is the Constitution of the United States that the Court is expounding, can be understood in two ways.

First, it can simply be read as referring to the burden of proof regarding the legitimacy of comparative reasoning. Scalia's argument could then be rephrased as follows: why should other legal systems be relevant in interpreting the U.S. Constitution? Understood in this way, the argument would be plausible as far as authority-based comparisons are concerned. According to general principles of argumentation, he who suggests a change in the prevalent situation has to give a reason for this change.[66] Even though U.S. courts sometimes use authority-based comparisons to justify an interpretation,[67] it is fair to say that such comparisons are not the rule. This means that those who wish to use authority-based comparisons as a way of justifying interpretations bear the burden of showing the legitimacy of such an approach.

An alternative reading of Scalia's reasoning suggests that Scalia is making the following argument. Only the U.S. Constitution is being interpreted by the Court. Therefore, other constitutions cannot be considered. However, understood in this way, the argument would be logically inconclusive. One cannot deduce the second one of the above-made statements from the first one, unless one assumes the very rule that Scalia is trying to prove, namely the rule that the interpretation of U.S. law can only be based on a limited number of sources and that these sources do not include foreign law.

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65. *Id.* at 868-69 n.4 (Scalia, J., dissenting). In choosing this wording, Scalia modified an expression used by Chief Justice Marshall in *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819), according to which the Supreme Court "must never forget that it is a [C]onstitution that [it is] expounding." There, the Supreme Court had to decide whether Congress had the constitutional power to incorporate a Bank of the United States, even though establishing a bank or creating a corporation were not among the powers expressly conferred by the Constitution. On behalf of the Court, Marshall argued that it is in the nature of a constitution not to specify everything in great detail. *Cf.* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 594-97 (1990).

66. *See, e.g.*, AULIS AARNIO, THE RATIONAL AS REASONABLE: A TREATISE ON LEGAL JUSTIFICATION 202 (1987) (emphasizing that "of necessity," a change in the prevailing situation must be justified). *See also* Choudhry, *supra* note 14, at 852 (suggesting that courts must justify why comparative law should count in the context of interpretation). References to the burden of persuasion are rather common in the debate on theories of legal interpretation. For example, Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 548 (1997), argues that in light of a longstanding tradition of relying on legislative history, the textualist approach advanced by Scalia bears "a heavy burden of justification."

67. *See, e.g.*, Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000).

This leaves the second argument advanced by Scalia in his dissent, namely the idea that the views of foreign nations cannot be imposed upon Americans through the Constitution. This argument hints at a conflict with two different principles: the principle of democracy, i.e., popular sovereignty, and the principle of national sovereignty, i.e., sovereignty with vis-à-vis other nations.

As far as the principle of democracy, i.e., popular sovereignty, is concerned, one has to distinguish between constitutional interpretation on the one hand and statutory interpretation on the other hand. The line of reasoning Scalia seems to have in mind is limited to the context of constitutional interpretation. Basically, Scalia seems to suggest the following point. The American people could have passed laws banning the death penalty completely or under certain circumstances. Unlike other nations, they have chosen not to do so. To use the Constitution as an instrument to impose the critical view of other nations vis-à-vis the death penalty on the American people would therefore be undemocratic. However, this argument is unconvincing. The above-described conflict between the will of the majority and the Constitution is the same in every case of judicial review.[68] Thus, the argument cannot be advanced against the use of comparative reasoning without questioning the institution of judicial review as well.

It is possible, however, to conceive of a more subtle argument that has the additional advantage of not being restricted to the context of constitutional interpretation. In a democratic society such as the United States, all authority is derived from the people.[69] One could argue that it is incompatible with this principle that the content of constitutional or statutory provisions is indirectly determined by what legislators and courts in other countries decide. In particular, this argument could be applied to those cases, in which the foreign statutes or court decisions have come into existence after the provision that is to be interpreted and therefore could not be taken into account by the national legislator. In my view, this version of the democracy-argument cannot be refuted on a general level. Depending on how comparative law is used, the possibility of a conflict with the principle of democracy appears plausible. For example, a strict principle according to which U.S. statutes are to be construed in accordance with

68. From the vast number of publications exploring this issue, *cf.*, *e.g.*, Robert Post, *The Brennan Center Symposium on Constitutional Law: Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429.

69. *See, e.g.*, ANTHONY A. BIRCH, THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY 49 (1993); Christopher W. Morris, *The Very Idea of Popular Sovereignty: "We the People" Reconsidered, in* DEMOCRACY 1, 12 (Ellen Frankel Paul et al. eds., 2000).

English statutes, even if the American statutes predate their English counterparts, may raise concerns. On the other hand, certain forms of comparative reasoning clearly do not come into conflict with the principle of democracy. This is true, for example, with regard to evaluative comparisons. On an abstract level, therefore, one can only conclude that any theory of comparative reasoning has to pay particular attention to the question of democratic legitimacy.

As mentioned before, Scalia's second argument can also be read as referring to the principle of external sovereignty, that is, sovereignty vis-à-vis other nations. One aspect of external sovereignty is the principle of self-determination.[70] One might argue that this principle is violated if the interpretation of U.S. statutes depends on decisions by foreign courts and legislators. However, this argument would only make sense if this mode of interpretation were imposed by another nation. By contrast, if a nation makes an autonomous choice to interpret its law in accordance with the law in other countries, this choice constitutes an exercise and not a violation of the nation's right to self-determination.

In summary, two points should be kept in mind with regard to a theory on the justification of authority-based comparisons. First, any such theory has to provide a positive justification why foreign law should be relevant to the interpretation of U.S. law. Second, a theory on the justification of authority-based comparisons has to be devised in such a way as to avoid a violation of the principle of democracy.

2. Printz v. United States

In *Printz* the Supreme Court faced the question of whether a federal statute requiring state officers to execute federal law violated the U.S. Constitution.[71] The Court answered the question in the affirmative, arguing that such a law was incompatible with the principle of state sovereignty.[72] In his dissenting opinion, Justice Breyer pointed to the fact that in many other federal systems it is usual for state bureaucracies to execute federal law. The Court, however, explicitly rejected this argument, stating that "such comparative analysis [is] inappropriate to the task of interpreting a constitution"[73]

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70. *See, e.g.*, Helmut Steinberger, *Sovereignty*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 500, 515-16 (Peter Macalister-Smith, North-Holland 2000).

71. *See* Printz v. United States, 521 U.S. 898, 898 (1997).

72. *See id.* at 898-99.

73. *Id.* at 921 n.11.

a. The Reasoning Advanced by Justice Breyer

For an analysis of the Court's reasoning, it is useful to first examine the structure of the argument advanced by Justice Breyer in his dissent. Breyer argues that

> the federal systems of Switzerland, Germany, and the European Union . . . all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws . . . enacted by the central 'federal' body . . . . They do so in part because they believe that such a system interferes less, not more, with the independent authority of the 'state' . . . and helps to safeguard individual liberty as well . . . [T]heir experience may. . .cast an empirical light on the consequences of different solutions to a common legal problem – in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity . . . . As comparative experience suggests, there is no need to interpret the Constitution as containing an absolute principle forbidding the assignment of virtually any federal duty to any state official[74]

Breyer clearly wants to undertake an evaluative comparison as part of a purposivist argument: He argues that analyzing experiences in Europe can help to discover the system that best serves the purpose of preserving state authority and safeguarding individual liberty. However, Breyer does not seem prepared to go all the way. He does not claim that experiences in Europe show the superiority of the concept he suggests. Rather, he only asserts that other federal systems "believe" that the execution of federal law by state authorities interferes less with state sovereignty than a federal bureaucracy would.

b. The Court's Reasoning

Against this background, the Court simply could have argued that the European experience provides no clear evidence that the "European solution" is more conductive to state sovereignty and personal liberty.[75] Instead, the Court chooses to make the much broader statement that "such comparative analysis is inappropriate to the task of interpreting a constitution."[76]

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74. *Id.* at 976.

75. Scalia hints at this weakness in Breyer's argument by pointing out that "Justice Breyer's dissent would have [the Court] consider the benefits that other countries, and the European Union, *believe* they have derived from federal systems that are different from [that of the U.S.]." *Id.* at 921 n.11 (emphasis added).

76. Printz v. United States, 521 U.S. 898, 921 n.11. (1997).

In support of this statement, the Court argues that "[t]he framers were familiar with many federal systems . . . . Some were . . . quite similar to the modern 'federal' systems that Justice Breyer favors. Madison's and Hamilton's opinion of such systems could not be clearer . . . . The fact is that our federalism is not Europe's. It is 'the unique contribution of the Framers to political science and political theory.'"[77]

This reasoning basically comprises two different arguments. First, the Court seems to imply that the comparative analysis undertaken by Breyer would be incompatible with the intent of the Framers. Second, the Court points to the uniqueness of American federalism as an obstacle to comparative reasoning. Both arguments, however, are vulnerable to critique.

i. The Intent of the Framers

With regard to the intentionalist aspect of the Court's reasoning, several objections can be raised.

On a logical level, it is questionable whether one particular criterion of interpretation, namely legislative intent, can – without further justification – be used to support the general rejection of another criterion of interpretation, namely evaluative comparisons. Any such argument already presupposes that in case of a conflict the former criterion prevails over the latter one. However, the Court does not give reasons why intentionalist arguments should be given more weight than comparative arguments.[78]

Moreover, the sources quoted by the Court may support the view that the Framers consciously decided not to copy certain other federalist structures. They do not, however, refer to other aspects of the Constitution. Hence, even if the Court's intentionalist argument were correct, it would hardly support the general conclusion that comparative analysis is "inappropriate to the task of interpreting a Constitution."

Also, the Court's intentionalist reasoning is not really apt to prove the inappropriateness of Breyer's evaluative comparison. The Court fails to

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77. *Id.*

78. It should be mentioned in this context that the relevance of the framers' intent to the interpretation of the U.S. Constitution is by no means clear. For a critical assessment *see, e.g.*, MICHAEL PERRY, MORALITY, POLITICS, AND LAW 122-31 (1988); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 23-69 (1988); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 888-948 (1985) (arguing that the Framers did not plan that their intentions should control the interpretation of the Constitution).

show that the Framers were actually opposed to evaluative comparisons in the context of interpretation. In fact, the Court itself quotes a passage in the federalist papers according to which "[e]xperience is the oracle of truth, and where its responses are unequivocal, they ought to be conclusive and sacred."[79] This statement certainly does not suggest that the Framers viewed evaluative comparisons as illegitimate. Rather, it supports the view that the Framers would have welcomed evaluative comparisons in the context of interpretation. The Court tries to smooth over this point by distinguishing sharply between the creation of the Constitution and its interpretation. According to the Court, "comparative analysis is inappropriate to the task of interpreting a Constitution, though it was of course quite relevant to the task of writing one."[80] However, the Court fails to present any evidence that the Framers subscribed to this alleged dichotomy.

One could object that the evaluative comparison made by Breyer conflicts at least indirectly with the intent of the Framers, because it supports the adoption of a legal concept that the Framers explicitly or implicitly rejected. Indeed, the Court seems to aim at making such an argument by reasoning that Hamilton and Madison were familiar with systems similar to the systems analyzed by Breyer and consciously failed to copy these systems.[81] However, this argument is flawed in two ways.

First, assume that the Framers had explicitly rejected the interpretation supported by Breyer's evaluative comparison, and that the intention of the Framers is the most decisive criterion in the context of constitutional interpretation. Even if one makes these two rather daring assumptions, this would only support the conclusion that the interpretation suggested by Justice Breyer is wrong. By contrast, there still would not be any reason to conclude that the comparative analysis suggested by Justice Breyer is per se inappropriate from a methodological point of view. After all, one has to distinguish between the legitimacy of a certain criterion of interpretation and the question of whether the interpretation supported by this criterion in a given case is the right one.

Second, the Court cannot show in a convincing manner that the interpretation suggested by Justice Breyer actually runs counter to the intent of the Framers. The Court fails to demonstrate that the Framers rejected the specific feature of European systems that Breyer concentrates

79. *See, e.g.*, Alexander Hamilton & James Madison, *The Federalist No. 20*, *in* THE FEDERALIST 128, (Jacob E. Cook,).

80. Printz v. United States, 521 U.S. 898, 921 n.11 (1997).

81. *Id.* at 921 n.11.

on, namely the execution of federal law by state authorities. Consequently, the Court has to argue that the Framers consciously rejected certain systems as a whole and that their intent was therefore bent on rejecting all the characteristics of these systems. However, it simply does not seem likely that the Framers, in rejecting certain federalist systems, actually intended to reject every possible feature of these systems. At best, one might argue that the Framers' actual intent was bent on rejecting those features that were a natural consequence of those concepts the Framers rejected. But the Court fails to show that the execution of federal law by state authorities represents such a natural consequence of the concepts of federalism rejected by the Framers.

Moreover, the Court itself does not seem prepared to bear the consequences of its own intentionalist reasoning. This becomes evident if one considers the following hypothetical. Assume that the Court is right, and that one can conclude from the Framer's choice not to copy a certain federalist system that the Framer's intent was bent on rejecting all the characteristics of this system. In this case, one would constantly have to engage in comparative reasoning, if only from a different perspective. With regard to every question of federalism, for example, analyzing the European federalist systems would allow the Court to find out what the Framers did not want. There is no indication, however, that the Court is willing to adopt such an approach.

In sum, the Court's intentionalist reasoning fails to support the rejection of comparative arguments both on a general level and with regard to the principle of federalism.

ii. The Uniqueness of the U.S. Constitution

This leads to the Court's second argument, namely the reference to the uniqueness of the American system of federalism. The question is how this uniqueness is relevant to the legitimacy of comparative reasoning. Several answers are possible. First, one can simply read the argument as referring to the burden of proof concerning the legitimacy of comparative reasoning. As mentioned above, this objection to the legitimacy of comparative reasoning is justified in as far as authority-based comparisons are concerned. However, in the case at hand, it is not convincing. Breyer makes an evaluative comparison as part of a purposivist argument. The Court itself implicitly acknowledges the legitimacy of purposivist reasoning by addressing the question whether the freedom of states not to execute federal laws is likely to harm or to promote state sovereignty. In particular, the Court argues that "the power of the Federal Government

would be augmented immeasurably if it were able to impress into its service" the police officers of the fifty states.[82] Against this background, the burden of proof as to why comparative law cannot be used as part of a purposivist argument lies with the Court.

An alternative reading of the uniqueness argument is that the American system of federalism is so different from its European counterparts that any experience made in Europe could not possibly provide information on whether the same legal "solution" would work in the United States. However, this view seems rather implausible. Even if experiences from other federal systems are not directly transferable to the American context, and therefore have to be evaluated with caution, there is no basis to generally exclude the possibility that these experiences offer insights that can be used in the U.S. context.

Hence, the uniqueness argument does not give any support to the Court's position.

c. Summary

In summary, the Supreme Court's reasoning in *Printz v. United States* does not offer any convincing objections to the use of comparative law in legal interpretation – either on a general level or in the case at hand.

B. OBJECTIONS RAISED IN THE EXISTING LITERATURE

As mentioned before, only a few scholars deal explicitly with the role of comparative law in legal interpretation. Consequently, the number of explicitly raised objections is also limited.

First, it has been suggested that comparative reasoning is illegitimate because it is incompatible with existing approaches to interpretation such as textualism.[83] The idea that likely underlies this argument is simple. If a certain method of interpretation, such as textualism, leads to the right interpretation, then the consideration of any other factor can only be misleading. This argument is logically flawless. In order to avoid it, a theory supporting the legitimacy of authority-based comparisons would have to meet at least one of two requirements. Either, it would have to make the claim that the traditional approaches to interpretation are at least partly wrong, or it would have to show that authority-based comparisons

82. *Id.* at 922.

83. *Cf.* Perales, *supra* note 14, at 899 (pointing out that since a textualist restricts himself to only studying the words and meaning of the law as written, he would never look to law from other countries).

are compatible with traditional theories of legal interpretation.

A second common objection is that foreign law is irrelevant.[84] However, this only points to a fact already mentioned above, namely that the advocates of authority-based comparisons bear the burden of establishing the legitimacy of such comparisons.

The third objection is a pragmatic one. It concerns the risk that the interpreter will often be prone to misunderstand foreign law.[85] However, this argument hardly justifies the general rejection of authority-based comparisons. First, courts often have to deal with arguments of great complexity in other contexts as well. Second, a number of legal systems, such as the legal system of the United Kingdom, are sufficiently similar to minimize the risk of misunderstandings.

In summary, only the first one of the above-mentioned objections is both convincing and adds to the objections raised by the Supreme Court.

C. THE PROBLEM OF CONSISTENCY

An obvious challenge for any theory defending the legitimacy of authority-based comparisons results from what may be called the problem of consistency.

Legal philosophers have long been debating the question of whether there is a single best answer to most or all legal questions.[86] Assume, for the moment, that this question has to be answered in the affirmative. In this case, it follows that there can only be one right interpretation as well. Prescriptive theories of interpretation seek to describe how this "right" interpretation should be identified. For example, a textualist approach will argue that in order to identify the "right interpretation," one should look to the text of the statute. Obviously, these theories face the problem of explaining *why* the use of a certain method of identification is supposed to lead to the right answer. To solve this problem, the relevant theories explicitly or implicitly argue that the same criterion that helps to identify the right meaning also *determines* the right meaning, that is, makes the meaning the right one. For example, a textualist will argue that a certain interpretation of a statute is the right one *because* it corresponds to the

84. *Cf.* Choudhry, *supra* note 14, at 825; Perales, *supra* note 14, at 900. *See also* Basil S. Markesinis, *Comparative Law – A Subject in Search of an Audience*, 53 MOD. L. REV. 1, 4 (1990) (questioning the need for comparative reasoning in the face of abundant domestic sources).

85. *Cf.* ABRAHAMSON & FISCHER, *supra* note 14, at 286; GLENN, *supra* note 14, at 986; PERALES, *supra* note 14, at 901.

86. *See, e.g.*, DWORKIN, A MATTER OF PRINCIPLE, *supra* note 23, at 119-145.

text.[87] Hence, prescriptive theories of legal interpretation usually postulate that the criteria for identifying the right meaning and the criteria that determine the right meaning are identical. This necessarily implies that the interpreter does not enjoy any leeway as far as criteria for identifying the right meaning is concerned. Any deviation from these criteria will either lead to a false interpretation or to an interpretation of which the rightness is merely due to the interpreter's good fortune.[88]

For advocates of comparative justification this leads to the following problem. Due to practical constraints, the ability of courts and other interpreters to take into account foreign law will usually be restricted. For example, many foreign decisions will not be available in English. Therefore, if the use of comparative law – alone or together with other factors – makes an interpretation the right one, most decisions would be wrong or only right by mere chance. Needless to say, this is not a very appealing prospect. Admittedly, some of the traditional theories on legal interpretation face a similar problem. In particular, many judges at lower courts as well as attorneys may not always have the resources to consider all the materials regarding the legislative history of a statute.[89] However, at least the Supreme Court has the means to routinely consider the legislative history of a statute. With regard to foreign law, however, even the Supreme Court does not have the means to consider all the relevant precedents from all foreign jurisdictions.

One could try to avoid this problem by arguing that the use of foreign law in the context of interpretation is only legitimate and, therefore, necessary when it is practical for the court to engage in legal comparisons. However, this would imply that the "right answer" depends on the individual court – a consequence that is hardly compatible with the assumption that there is only one right answer.

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87. The underlying idea is that it is the text of the statute alone that has been enacted by the legislature. In other words, the text is the law. *See, e.g.*, Frank H. Easterbrook, *Textualism and Democratic Legitimacy: Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119 (1998); *see also* Frank H. Easterbrook, *Symposium on Statutory Interpretation: What does Legislative History Tell Us?*, 66 CHI.-KENT. L. REV. 441, 444 (1990). That does not, of course, exclude the possibility of justifying textualism by reference to meta-goals such as democracy, rule of law, etc.

88. This conclusion is independent of whether one thinks that an interpreter should consider one or several factors. If certain factors are generally recognized to make an interpretation the right one, then one cannot disregard any of these factors in individual cases.

89. One should not, however, overestimate this problem. *See, e.g.*, ESKRIDGE ET AL., *supra* note 7, at 296 (pointing out that most legislative history at the federal level is not only relatively easy to find, but it is also much easier to collect than it was ten years ago because so much of it is available on the internet and on microfiche).

One could, of course, question the basic premises of the whole argument described above by claiming that there is no single right answer in hard cases. However, this would not solve the problem. If one rejects the idea of a single right answer, then one has to make one of two alternative assumptions. First, one can assume it is legitimate to use authority-based comparisons in deciding which answers are right and which are not. In this case, the problem one faces is the same as the one described above. Second, one can assume that comparative law is only a legitimate way of choosing between several equally right answers.[90] In this case, as has already been explained above, authority-based comparisons are not used as a means of justification at all.

In sum, any attempt to establish the legitimacy of authority-based comparisons has to give a plausible explanation why it is legitimate to use such comparisons selectively.

Summary: Objections to the Use of Comparative Law

To summarize the preceding sections, a theory of comparative reasoning advocating the use of authority-based comparisons has to meet the following requirements. First, it has to give a positive justification as to why the use of such comparisons is legitimate. Second, it has to either refute traditional theories of legal interpretation or show that it is compatible with them. Third, a theory of comparative reasoning must be devised in such a way as to avoid a conflict of the principle of democracy, and fourth, such a theory must solve the problem of consistency.

IV. A DISCOURSE THEORY OF COMPARATIVE REASONING

This Part argues that the discourse theory of Jürgen Habermas can provide the basis for justifying the legitimacy of authority-based comparisons. Admittedly, Habermas's discourse theory is itself the object of intense criticism.[91] To attempt to refute this criticism, however, would

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90. *See, e.g.*, HART, *supra* note 92, at 246-47 and accompanying text. (describing it as legitimate for a judge to refer in certain cases to foreign law).

91. *See, e.g.*, RICHARD J. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY, 223-25 (1976); *see also* RAYMOND GEUSS, THE IDEAOF A CRITICAL THEORY 66-67 (1981) (arguing that Habermas is simply generalizing his own mode of interaction with other philosophers and that most of the language games of everyday life do not contain features that would lead its participants to engage in discourse); *see also* ALVIN GOULDNER, THE DIALECTICOF IDEOLOGY AND TECHNOLOGY 138-46 (1976) (claiming that Habermas's model of the ideal speech situation actually provides barriers to agreement and consensus by placing unrealistic demands on the conditions of a rational consensus); *see also* DAVID HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 396 (1980) (arguing that the

be a project far too ambitious for this article. Therefore, this article will assume Habermas's theoretical approach to be correct and concentrate on its relevance to the legitimacy of authority-based comparisons in legal interpretation.

Section A summarizes the relevant aspects of Habermas's discourse theory. Section B focuses on the theory's implications for the legitimacy of authority-based comparisons.

A. THE DISCOURSE THEORY OF JÜRGEN HABERMAS

Several aspects of Habermas's discourse theory are of importance in the context of legal reasoning. They include Habermas's version of the consensus theory of truth, his consensus theory of rightness, and his concept of moral-practical discourse

1. The Consensus Theory of Truth

Any theory of truth has to first identify the object that is to be called true or false. Habermas agrees with Austin that what we call true or false are not sentences but statements.[92] Persons can use different sentences to express the same statement, and at the same time, the same sentence can, relative to its context, express different meanings.[93]

This leads to the question of how to define the truth of a statement. According to the correspondence theory, as formulated by Austin, a statement is true when it corresponds to a historic state of affairs that exists in the world.[94] Relying on Strawson, Habermas criticizes this concept of truth. In order for the correspondence theory of truth to make sense, there would have to be a fact to which the statement corresponds, and this fact would have to be part of the real world in the same way that objects of experience are part of the real world.[95] However, this is not the case. Facts

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ideal speech situation described by Habermas is not a sufficient condition for a fully open discourse, since the conditions of the ideal speech situation "fail to cover a range of phenomena, from the nature of cultural traditions to the distribution of material resources"); *Cf.* Frederick Schauer, *Symposium: The Right to Privacy One Hundred Years Later: Reflections on the Value of Truth,* 41 CASE W. RES. L. REV. 699, 709-10 n.35 (1991) (offering a particularly polemical critique of Habermas's theory of truth).

92. *Cf.* J.L. Austin, *Truth, in* TRUTH 18, 20 (George Pitcher ed., 1964); Jürgen Habermas, *Wahrheitstheorien [Theories of Truth], in* WIRKLICHKEIT UND REFLEXION [REALITY AND CONTEMPLATION] 211, 211-12 (Helmut Fahrenbach ed., 1973) [hereinafter Habermas, *Wahrheitstheorien].*

93. *See* Habermas, *Wahrheitstheorien, supra* note 92, at 211.

94. *See* Austin, *supra* note 92, at 22.

95. Habermas, *Wahrheitstheorien, supra* note 92, at 215; *See also* P.F. Strawson, *Truth, in*

are not part of the real world the way objects are.[96] They are not, "like things or happenings on the face of the globe witnessed or heard or seen."[97] Correspondingly, the relationship between objects and statements is not the same as that between facts and statements. Objects, events, etc. are what statements are about. Facts, on the other hand, are what statements, if true, state.[98]

This reasoning leads Habermas to suggest a different concept of truth. Referring to Austin's theory of speech acts,[99] Habermas recognizes that the act of using language has a variety of components.[100] To begin with, a speech includes the act of uttering an expression, the so-called utterance act. This utterance usually has a certain semantic meaning. This semantic meaning is referred to as the propositional act.[101] Furthermore, the speaker acts by speaking, e.g. in that he makes a promise. This aspect of the speech act has been termed the illocutionary act.[102] Finally, the speaker affects the listener, e.g. in that the speaker frightens, amuses or deceives the listener. This aspect is termed the perlocutionary act.[103]

In addition to distinguishing between the different components of a

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TRUTH 32, 37 (George Pitcher ed., 1964) ("The only plausible candidate . . . of what in the world makes the statement true is the fact it states; but the fact it states is not something in the world.").

96. Habermas, *Wahrheitstheorien, supra* note 92, at 215.

97. Strawson, *supra* note 95, at 38; *See* Habermas, *Wahrheitstheorien*, *supra* note 92, at 215. (quoting Strawson's argument is quoted literally by Habermas).

98. *See* Habermas, *Wahrheitstheorien*, *supra* note 92, at 215. *See also* Strawson, *supra* note 95, at 37 ("Statements are about . . . objects; but they state facts.").

99. *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson. 1965). A basic insight of speech act theory is that the speaker does more than simply convey information. Making promises, giving orders, thanking someone, betting on a race, apologizing to someone, greeting someone – all these are instances of communication that go beyond the mere conveyance of information. The concept of the speech act and its different components illuminates these different aspects of the use of language. Austin argues that one can distinguish several constituent components of a speech act. To begin with, a speech act includes the act of uttering an expression, the so-called utterance act. This utterance usually has a certain semantic meaning. Austin refers to this semantic content of the speech act as the propositional act. Furthermore, the speaker acts by speaking, e.g. in that he makes a promise. This aspect of the speech act has been termed the illocutionary act. Finally, the speaker affects the listener, e.g. in that the speaker frightens, amuses or deceives the listener. This aspect is termed the perlocutionary act. *See id.* at 110, 148-64. Later scholars have suggested a variety of differing classifications. *See, e.g.*, John R. Searle, *A Taxonomy of Illocutionary Acts, in* EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS 1 (1979); JURGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION 325-26 (T. McCarthy trans., 1984) [hereinafter referred to as HABERMAS, THEORY OF COMMUNICATIVE ACTION].

100. *See* HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 999, at 288-89.

101. *See id.*

102. *See id.*

103. *See id.*

speech act, Habermas – as others before him[104] – suggests a classification between different types of speech acts.[105] For example, in case of an imperative speech act, the speaker refers to a desired state in the world so as to get the hearer to bring about this state.[106] By contrast, in case of a constative speech act, one asserts a statement.[107]

It is with regard to such constative statements that the concept of truth is used.[108] By asserting a statement, one claims that it is true. Truth, therefore, is a "validity claim that [one] annexe[s] to statements by asserting them."[109] The validity claim can be either justified or unjustified.[110] This definition of truth reverses the traditional relationship between the truth of a statement, and the justification of the corresponding assertion. As Alexy puts it, "the soundness of an assertion . . . [is] no longer dependent on the truth of what is asserted, as has been traditionally supposed, but on the contrary, the truth of what is asserted is made to depend on the soundness of the assertion."[111]

This leads to the problem of how to define the conditions under which the validity claim inherent in the assertion of a statement is made in a justified manner. Habermas answers the question as follows: The validity claim in question is justified if it can be redeemed discursively.[112] According to Habermas, this is the case if everyone else could agree with the relevant statement provided they would enter into a discourse.[113]

Obviously, this answer is in need of explanation. What justifies the thesis that the validity claim inherent in an assertion is justified if it can be redeemed discursively in the manner described above? One might be tempted to argue that the criteria for justifying a claim will depend on what is claimed. Therefore, one could refer to the semantic meaning of the word "truth." By claiming that a statement is true, one could argue, one really means to say that the relevant statement can be discursively redeemed. This would easily explain why in order for the relevant claim to be justified, it would be both necessary and sufficient that the claim be redeemable discursively. Indeed, at first glance, such an understanding of

104. *See, e.g.*, AUSTIN, *supra* note 999, at 148-64; Searle, *supra* note 99, at 1.
105. *See* HABERMAS, THEORY OF COMMUNICATIVE ACTION, *supra* note 999, at 325-326.
106. *See id.*
107. *See* Habermas, *Wahrheitstheorien, supra* note 92, at 212.
108. *See id.*
109. *Id.*
110. *See id.*
111. ALEXY, *supra* note 7, at 104.
112. *See* Habermas, *Wahrheitstheorien, supra* note 92, at 219.
113. *See id.*

Habermas' concept of truth seems to be suggested by Habermas' assertion that "truth means the promise of a rational consensus."[114] However, such a semantic approach is hard to reconcile with what is commonly perceived to be the ordinary meaning of the word truth. As Habermas himself points out, a statement is said to be true if it states a fact.[115]

Hence, a different approach is necessary. Instead of focusing on the meaning of that which is claimed (namely that a statement is true), one can focus on what it means to claim.[116] In other words, what is the point of making a validity claim? In a social context, the act of making a claim only makes sense if the author of the claim makes some implicit promise of redemption. Therefore, the very concept of a claim implies the possibility to redeem the claim somehow. As Habermas puts it, "[i]t lies in the nature of validity claims that they can be redeemed; and that by which they can be redeemed determines their meaning."[117] It follows, therefore, that the meaning of truth – as a validity claim – lies in the promise of redemption.[118]

This leads to two further questions. First, it has to be explained why the relevant validity claim should be redeemed discursively. Second, one must justify why discursive redemption should imply the potential agreement of all others. To answer the first question, Habermas points to the fact that statements are not directly verifiable in an empirical fashion.[119] That is because statements are not identical with experiences. Experiences can support validity claims.[120] However, the methodical use of experience, for example in experiments, remains dependent on interpretation that can only maintain their validity in discourse.[121] Indeed, the notion of fact cannot be defined independently of the concept of discourse.[122]

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114. *Id.*

115. *See id.* at 212.

116. *Cf.* THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 303 (1978) (suggesting that what is at stake is not the semantic meaning of a word but the pragmatic meaning of an act, namely the act of claiming to be true); *but see* Lawrence B. Solum, *Symposium: Law and Social Theory: Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U.L. REV. 54 (1989) (arguing that the meaning of the validity claim remains unclear).

117. Habermas, *Wahrheitstheorien*, *supra* note 92, at 239.

118. *See id.* at 219.

119. *Cf. id.* at 218.

120. *See id.*

121. *See id.* at 218.

122. *See* Habermas, *Wahrheitstheorien, supra* note 92, at 217 ("Der Sinn von 'Tatsache' oder 'Sachverhalt' kann nicht ohne Bezugnahme auf Diskurse geklärt werden, in denen suspendierte Geltungsansprueche von Behauptungen prüfen. [The meaning of 'fact' or 'state of affairs' cannot be explicated without referring to discourse, in which we examine suspended validity claims of assertions.]")

The question remains why discursive redemption should imply the potential agreement of all others. Habermas does not claim to answer this question completely.[123] However, he points to the fact that claims to validity are characterized by inter-subjectivity.[124] One cannot sensibly claim that a statement is only true for a particular individual.[125] This arguably implies that under ideal conditions, all potential participants in a discourse could agree with the statement in question.

2. The Consensus Theory of Rightness

According to Habermas, truth is not a quality that applies to norms.[126] The assertion of a (moral) norm, like the assertion of a statement, amounts to a validity claim. However, the validity claim made when a norm is asserted has a different content. It means that a valid norm is justly recognized, and that it should be recognized as valid.[127] Thus, the relevant criterion is not truth, but rightness.[128] However, according to Habermas, rightness claims can be redeemed in fundamentally the same fashion as truth claims, namely discursively.[129]

Hence, a norm is right, if – under ideal conditions – all participants in a moral-practical discourse could be convinced of its rightness.[130]

3. The Rules Governing Moral-practical Discourses

Both the truth of statements and the rightness of norms depend on the possibility of a consensus. However, this consensus is not to be understood as the reaching of an actual agreement in a specific situation. As mentioned above, the rightness of a norm as well as the truth of a statement depend on the potential agreement of all. The concept of consensus could not serve as a criterion of truth or rightness, if any purely incidental agreement could be called a consensus in the above-mentioned sense.[131] Among other things, this follows from the fact that different individuals may reach different agreements on the same question.

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123. *Cf. id.* at 218 (stating that the necessity of discursive redemption "legt nahe [suggests]" a consensus theory of truth).
124. *See id.* at 223.
125. *See id.*
126. *See id.* at 237.
127. *See* Habermas, *Wahrheitstheorien, supra* note 92, at 237.
128. *See id.*
129. *See id.*
130. *See id.* at 237.
131. *See id.* at 239.

Therefore, the promise of a consensus inherent in rightness or truth claims must be understood as the promise of an ideal and universal consensus.[132] Such a promise means that "a consensus could be reached anytime and anywhere, if only [one] entered into a discourse."[133] In other words, one has to "refer to the judgment of others, namely to the judgment of all those with whom [one] could enter into a conversation [which] contrafactually [includes] all those conversation partners that [one] could find if [one's own] life history were coextensive with that of humankind"[134] Moreover, it must be possible to reach the consensus under circumstances that make this consensus a rational one.[135] For example, a consensus could not be called rational if it could only be reached due to external constraints.[136]

This leads to the problem of how to define the conditions for a rational consensus. Particularly with regard to discourses relating to the rightness of a norm, this problem has to be approached with caution. It must be avoided that certain value judgments are rephrased as necessary preconditions for a rational consensus and thereby insulated from the need of discursive justification. To solve this problem, Habermas suggests accepting only those rules as preconditions for a rational discourse that the very concept of discourse necessarily implies.[137] In other words, the discourse rules have to be regarded as "conditions for argumentation" ("Argumentationsvoraussetzungen"), that everyone who enters into an argumentation has to presuppose at least implicitly.[138] Habermas identifies three levels of rules that are necessary to guarantee a rational consensus, namely rules on a logical-semantic level, rules on a dialectical level, and

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132. Given that "rational consensus" functions only as an ideal, it is questionable whether the name "consensus theory of truth" is appropriate for Habermas' theoretical approach. Indeed, Habermas himself suggests that the name "discourse theory of truth" might be more appropriate. *See* Habermas, *Wahrheitstheorien, supra* note 92, at 239 n.33. In any case, Habermas' concept of a rational consensus avoids the objections that are typically advanced against consensus theories of truth. For example, Dworkin argues that the lack of consensus regarding a certain judgment does not prove that the judgment in question is wrong. *See* DWORKIN, A MATTER OF PRINCIPLE, *supra* note 23, at 175. Obviously, Habermas would agree. Just as the existence of an actual agreement does not prove the truth of a statement or the rightness of a norm, the absence of such an agreement is no proof that a statement is false or a norm wrong.

133. Habermas, *Wahrheitstheorien, supra* note 92, at 239.

134. *Id.* at 219.

135. *See id.* at 239.

136. *Cf. id.* at 257-58.

137. *See* JÜRGEN HABERMAS, MORALBEWUSSTSEIN UND KOMMUNIKATIVES HANDELN [MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION], 97-103 (1983) [hereinafter HABERMAS, MORAL CONSCIOUSNESS].

138. *Cf.* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 137, at 97.

rules on a rhetorical level.[139]

a. The Logical-semantic Level

Argumentation aims at producing convincing arguments in order to redeem or refute validity claims.[140] This presupposes certain logical and semantic rules that do not themselves have any ethical content.[141] To exemplify these rules, Habermas cites a number of rules suggested by Alexy:

(I.1) No speaker may contradict him- or herself.

(I.2) Every speaker who applies a predicate F to an object *a* must be prepared to apply F to every other object which is like *a* in all relevant respects.

(I.3) Different speakers may not use the same expression with different meanings.[142]

b. The Dialectical Level

An argumentation also constitutes a special form of interaction, namely a cooperative search for the truth that is organized as a competition.[143] This presupposes certain pragmatic conditions. For example, it must presuppose the sincerity of all participants in the dialogue.[144] Moreover, there must be general rules regarding the question of competence and relevance in order to distribute burdens of proof as well as to structure subjects and contributions to the dialogue.[145] Referring to Alexy, Habermas gives two specific examples:

(II.1)Every speaker may only assert what he or she actually believes.

(II.2)Whoever attacks a statement or norm which is not the subject of the discussion must state a reason for doing so.[146]

c. The Rhetorical Level

On a rhetorical level, an argumentation is a communication process

139. *Cf. id.* at 97.
140. *See id.*
141. *See id.*
142. *Id.*; *see* ALEXY, *supra* note 7, at 188.
143. *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 137, at 98.
144. *See id.*
145. *See id.*
146. *Id. See* ALEXY, *supra* note 7, at 188, 192.

with the aim of a rational consensus.[147] According to Habermas, a completely rational consensus implies a so-called ideal speech situation.[148] Referring to Alexy, who specified Habermas' earlier suggestions, Habermas summarizes the conditions for the ideal speech situation as follows:

(III.1)Everyone who can speak may take part in discourse.

(III.2)(a) Everyone may call into question ("problematisieren") any assertion.

(b)Everyone may introduce any assertion into the discourse.

Everyone may express his or her attitude, wishes, and needs.

(III.3)No speaker may be prevented from exercising the rights laid down in (III.1) and (III.2.) by any kind of coercion internal or external to the discourse.[149]

Like the rules on the other two levels, the rules governing the ideal speech situation are not simply conventions but inevitable presuppositions for argumentation.[150] This can be shown as follows. Assume that a person claims that a rational consensus has been reached. According to Habermas, this person would contradict himself, if he were to reject the preconditions for the ideal speech situation.[151] For example, if the person were to reject rule (III.3.), he would have to rephrase his claim in the following way: "After forcing our view on participants A, B, C, etc., we finally reached a consensus that N is right."[152]

It should be noted that the preconditions for rational discourse described above, particularly the conditions for the ideal speech situation, will never be fully realized in the real world.[153] For example, actual discourses are typically limited with regard to time and space of the discussion and take place within a certain social context.[154] This corresponds to the fact that the rational consensus that forms the criterion for truth or rightness is an ideal one. Nevertheless, the rationality of real discourses depends on the degree to which these real discourses meet the requirements set forth by the discourse rules. Consequently, with regard to

147. *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 137, at 99.
148. *See id.*
149. *Id. See* ALEXY, *supra* note 7, 193. Habermas first developed the model of the ideal speech situation in Habermas, *Wahrheitstheorien, supra* note 92, at 252-60.
150. *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 137, at 102.
151. *See id.* at 100-01.
152. *Cf. id.*at 101.
153. *See id.* at 100.
154. *See id.* at 102.

actual discourses, institutional measures are necessary to ensure that the discourse rules are at least realized to a sufficient degree.[155]

d. The Implications for Legal Reasoning in General

This leads to the question of why the rules for practical discourse should be relevant to legal reasoning.

Robert Alexy has argued that legal discourse is only one form of moral-practical discourse, a view that is known as the "special-case thesis."[156] In support of this view, Alexy has, among other things, pointed to the fact that legal discourses deal with practical questions, namely questions of what should be done or may be done.[157]

However, Habermas and other scholars have criticized this thesis on various grounds.[158] Habermas originally argued that at least in the context of legal proceedings, legal discourse does not constitute a cooperative search for truth.[159] Rather, both sides try to "win," and indeed, they are permitted to advance the legal view that best accommodates their own interests.[160] This objection originally motivated Habermas to characterize legal discourse as a strategic undertaking rather than as a practical discourse.[161] However, as Alexy has pointed out, the participants in a legal discourse nevertheless make the claim that their views are "correct" within the framework of the existing legal order.[162] More importantly, the court will – at least in theory – decide the case based on the force of the better argument.[163] Therefore, Habermas now acknowledges that one can plausibly consider legal discourse to be a cooperative effort to find the right

155. *See* HABERMAS, MORAL CONSCIOUSNESS, *supra* note 137, at 102.

156. ALEXY, *supra* note 7, at 211-20.

157. *See id.* at 15, 19, 212-13. Alexy further argues that legal discourse is a special case of moral-practical discourse, because the participants discuss the relevant questions with the claim to correctness. *See id.* at 15, 19, 213.

158. *Cf.* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 230-33 (William Rehg trans., MIT Press 1996) (1992) [hereinafter HABERMAS, FACTS AND NORMS].

159. *See* Jürgen Habermas, *Theorie der Gesellschaft oder Sozialtechnologie?: Eine Auseinandersetzung mit Niklas Luhmann [Theory of Society or Social Technology?: A Critique of Niklas Luhmann], in* THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE-WAS LEISTET DIE SYSTEMFORSCHUNG [THEORY OF SOCIETY OR SOCIAL TECHNOLOGY – WHAT ARE THE ACHIEVEMENTS OF SYSTEMS THEORY] 142, 200-01 (Jürgen Habermas & Niklas Luhmann eds., 1971) [hereinafter Habermas, *Theorie der Gesellschaft*].

160. *See* ALEXY, *supra* note 7, at 218; Habermas, *Theorie der Gesellschaft, supra* note 159, at 200-01.

161. *See* Habermas, *Theorie der Gesellschaft. supra* note 159, at 201.

162. *See* ALEXY, *supra* note 7, at 214.

163. *Cf. id.* at 214-15 (pointing out that under German law judges have to make the claim that their decision is correct).

answer.[164]

Nevertheless, Habermas continues to reject the special-case thesis insofar as it depicts legal discourse as a special kind of moral discourse.[165] His argument can be summed up as follows: As Alexy himself admits, "the rationality of legal argumentation is . . . to the extent that it is determined by statute, relative to the rationality of legislation."[166] According to Habermas, this difference effectively undermines the special case thesis. "Validity claims are binarily coded and do not admit of degrees of validity."[167] Hence, the fact that positive law diverges from moral norms "has the . . . consequence not only of relativizing the rightness of the legal decision but of calling it into question as such."[168] Therefore, one cannot assimilate "the legitimacy of legal decisions to the validity of moral judgments."[169]

Klaus Günther has suggested solving this dilemma by distinguishing between moral-practical discourses of justification and moral-practical discourses of application.[170] In the discourse of application, the validity of legal norms, e.g., statutes, is presupposed. Thus, the discourse relating to norm-application is relieved of the burden of justification.[171] Habermas embraces this terminology.[172] However, he points out that the distinction between discourses of justification and discourses of application could only support the special-case thesis, if, in supposing the validity, i.e. the legitimacy of a norm, courts would also presuppose their moral rightness.[173]

According to Habermas, this is not the case. The legitimacy of legal statutes it determined not only by the rightness of moral judgments but, among other things, by the availability, cogency, relevance, and selection of information, by how fruitful such information proves to be, by how appropriately the situation is interpreted and the issue framed, by the

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164. *See* HABERMAS, FACTS AND NORMS, *supra* note 158, at 231.

165. *See id.* at 233.

166. ALEXY, *supra* note 7, at 289. *See also* HABERMAS, FACTS AND NORMS, *supra* note 15858, at 231 (quoting this passage literally).

167. HABERMAS, FACTS AND NORMS, *supra* note 158, at 232; *see also* Jürgen Habermas, *Habermas on Law and Democracy: Critical Exchanges: Part II: Habermas Responds to His Critics: Reply to Symposium Participants, Benjamin N. Cardozo School of Law,* 17 CARDOZO L. REV. 1477, 1531 (1996) (stressing the importance of the binary code of legal/illegal) [hereinafter Habermas, *Habermas on Law and Democracy*].

168. HABERMAS, FACTS AND NORMS, *supra* note 158, at 232.

169. *Id.* at 233.

170. *See* Klaus Günther, *A Normative Conception of Coherence for a Discursive Theory of Legal Justification*, 2 RATIO JURIS 155, 163 (1989).

171. *See, e.g.,* HABERMAS, FACTS AND NORMS, *supra* note 158, at 232.

172. *See, e.g.*, Habermas, *Habermas on Law and Democracy, supra* note 167, at 1532.

173. *See e.g.,* HABERMAS, FACTS AND NORMS, *supra* note 158, at 233.

rationality of voting decisions, by the authenticity of strong evaluations, and by the fairness of the compromise involved.[174]

It does not follow, however, that the principles governing rational discourse are inapplicable to legal reasoning.[175] Rather, "the rational discourse presupposed by the discourse principle . . . branches out, on one side into moral argumentation, on the other into political and legal discourses that are institutionalized in legal form and include moral questions only in regard to legal norms."[176] This means that legal discourses are not simply special cases of moral discourses.Rather, "they refer from the outset to democratically enacted law."[177] However, as has been mentioned above, the discourse-rules are necessary preconditions for all forms of argumentation. Legal discourse, though it may not be a special case of moral-practical discourse, still claims to be rational.[178] Hence, it is justified to apply the discourse rules.[179]

B. THE IMPLICATIONS FOR COMPARATIVE REASONING IN LEGAL INTERPRETATION

This leads to the question of how the discourse rules described above relate to the interpretation of norms in general and to comparative reasoning in legal interpretation in particular. Based on his special case-thesis, Alexy has argued that the traditional criteria of interpretation are "forms in which legal reasoning has to be cast if it is to fulfil [sic] its claim to correctness, which, unlike that of a general practical discourse, contains acknowledgement of the mandatory quality of legislation."[180] In support of his view, he points to "the structural correspondence between the rules and forms of legal discourse and those of general practical discourse."[181] One cannot, in my view, refute this reasoning on the grounds that the special-case thesis is mistaken. Given that the discourse-rules apply to legal discourse as well as to practical discourse, the special-case thesis is not essential to Alexy's argument. However, the more important weakness in Alexy's reasoning is that he does not give any information on the alleged structural correspondence between the traditional criteria of interpretation and the discourse-rules. Indeed, this deficit is pointed out by Habermas

174. *See Id.* at 232-33.
175. *See id.* at 233.
176. *Id.* at 233-34.
177. *Id.* at 234.
178. *Cf.* JÜRGEN HABERMAS, FACTS AND NORMS, *supra* note 158, at 232.
179. *Cf. id.*
180. *See* ALEXY, *supra* note 7, at 250.
181. *Id.* at 289.

who emphasizes the fact that "[a] brief allusion to structural similarities in the rules and forms of argument respectively deployed in the two types of discourse is not sufficient."[182]

Nevertheless, it seems plausible to use the discourse rules in order to establish the legitimacy of certain methods of justification in the context of legal interpretation. In my view, there are – at least in theory – three different ways to achieve this aim.

The first possibility would be to show that a certain method of justifying legal decisions represents the outcome of a perfectly rational discourse. In other words, one would have to establish that under ideal conditions, every participant in a discourse would agree that the method in question is justified. However, in practice, such a proof seems hardly possible with regard to the question at hand, given that scholars have been discussing the criteria for legal interpretation for centuries without reaching a consensus.

The second possibility is to show that a certain principle of justifying interpretations is identical with one of the discourse rules. For example, rule (I.1) prohibits contradictory reasoning. Consequently, one can establish an identical rule in the context of interpretation, according to which one cannot justify an interpretation with arguments that contradict each other. However, it does not seem possible to justify the legitimacy of authority-based comparisons in this way.

Third, it must be remembered that legal discourse, particularly in the context of legal proceedings, takes place under factual constraints. For example, in order to guarantee a speedy trial, the discourse must be limited both with regard to the time frame and with regard to the number of participants. Against this background, "rules of court procedure in the area of legal application are meant to compensate for the fallibility and decisional uncertainty resulting from the fact that the demanding communicative presuppositions of rational discourses can only be approximately fulfilled."[183] This suggests that a method of justifying interpretations, in order to derive its legitimacy from the discourse rules, need not be identical with one of these rules. Rather, it is sufficient that the relevant method is suited to narrowing the gap between the discourse rules described above and the reality of legal discourse.

This third method of justifying a method of interpretation with the discourse rules is the most promising in the context at hand. Authority-

182. HABERMAS, FACTS AND NORMS, *supra* note 158, at 231 (footnote omitted).
183. *Id.* at 234.

based comparisons can be used to narrow the gap between the ideal of rational discourse and the reality of legal proceedings by compensating for some of the restrictions imposed on institutional legal discourse. Two aspects should be distinguished, namely the "procedural value" of past legal proceedings and the role of foreign decisions as views in a given legal discourse.

Consider first what may be called the "procedural value" of past legal proceedings. It has been mentioned above that the discourse rules will never be completely realized in actual legal proceedings. The legal rules governing such proceedings are to compensate the existing deficiencies, but this compensation will never be complete. Hence, one can never be certain whether a certain court decision is identical with the hypothetical result of a completely rational discourse or whether it has been brought about by illegitimate factors, such as external constraints. However, if the same decision has been reached in other legal proceedings meeting a similar standard of rationality, the likelihood that a certain decision has been reached because it is the right decision increases. Consider, for example, the above-mentioned decision *Sandoval* As stated above, the Court of Appeals for the Ninth Circuit held that the Establishment Clause of the First Amendment made it illegal for the prosecutor in a criminal case to invoke biblical teachings to persuade a jury.[184] Theoretically, it is possible that the judges arrived at this result not by considering the arguments of both sides but by imposing their own atheist attitude on the law. The fact, however, that the Ontario Court of Appeals reached the same conclusion suggests that maybe an impartial judge will tend to find this position convincing. Of course, decisions by foreign courts can be based on the same flaws that the referring court's reasoning is suffering from. However, if legal proceedings are supposed to have any value at all, the fact that different proceedings lead to the same decision must be considered an indicator that the relevant decision is indeed correct.

The second aspect regards the number of participants in legal discourse. As mentioned above, one of the discourse rules demands that everyone who can speak may take part in the discourse. In other words, the number of participants in the discourse is ideally unlimited. In the context of a legal proceeding, of course, this requirement cannot be met for practical reasons. The number of those exchanging arguments is restricted to the parties, their attorneys, and the judges. By introducing authority-based comparisons as a legitimate form of legal reasoning, however, one can partially compensate for the limited number of discourse-participants.

184. *See id.* at 777.

If courts have to consider decisions by foreign courts, the number of views entering the discourse increases. Of course, one could also increase the number of views entering the discourse by referring, for example, to legal treatises and other publications. However, decisions by foreign courts are much more likely than "private" publications to meet the requirement of sincerity set forth in discourse rule (II.1.).

In sum, for the two reasons described above, Habermas' discourse theory can justify the legitimacy of authority-based comparisons.

V. OBJECTIONS

Both to test the discourse-theoretic justification of authority-based comparisons and to develop it in a more detailed fashion, it is useful to consider possible objections. Section A of this Part considers objections that can be derived from discourse theory itself. Section B deals with the general objections against comparative reasoning that were developed in Part III.

A. OBJECTIONS ON THE BASIS OF DISCOURSE THEORY

To begin with, one could argue that courts in other countries do not address the same legal questions. They apply different statutes, they are faced with different preferences in the population, and their decisions must be seen in the context of a different legal system. This objection is plausible, but does not support a general rejection of authority-based comparisons. Rather, it increases the requirements that such comparisons have to meet in order to be legitimate. An interpreter who wants to justify his interpretation of a particular provision by referring to decisions made by foreign courts bears the burden of proof that the foreign decision addresses the same question and is based on considerations that also apply to the case at hand. Consider, for example, the above-mentioned decision *Sandoval.* In this decision, the Court of Appeals for the Ninth Circuit argued that "[t]he Canadian Constitution does not recognize the separation of church and state . . . . Yet the Canadian court found counsel's references to biblical stories to be 'inappropriate in the extreme.'"[185] In other words, the Court showed that the interpretation chosen by the Ontario Court of Appeals was not due, as one might suppose, to a different understanding of the relationship between church and state.

It must be realized, of course, that it is practically impossible to show that the questions faced by foreign courts are comparable in all respects.

185. *Id.* at 777.

However, one can solve this problem in a pragmatic way. The interpreter, who wants to refer to a foreign court decision, only has to make a prima facie showing that the decision can be transferred to the context at hand.If he meets this burden, then it is up to the other side to show that the reference to the decision in question is inappropriate after all.

The second objection refers to the relationship between substantive arguments and the reference to foreign decisions. As stated above, the legitimacy of a legal decision presupposes that the decision in question is the outcome of a rational discourse. In other words, decisions are legitimate only in as far as they are based on the force of the better argument. This requirement, one could argue, is incompatible with the concept of authority-based comparisons. By giving weight to the decision of a foreign court as such, the interpreter does not make a substantial argument as to why one interpretation is more appropriate than another. Rather, he only introduces an additional point of view in the discussion or, at best, provides some evidence that the relevant interpretation would likely be the outcome of a rational discourse. If, therefore, the reference to a foreign decision could be used to overcome a substantive argument, the court could reject the solution that it considers most rational in favor of the solution that a foreign court has considered to be the most rational. This objection, too, is in principle justified. However, it can be avoided, if the reference to foreign decisions is given an auxiliary role in legal interpretation. Authority-based comparisons, then, would only enter into the game if no side can be shown to be supported by stronger arguments than the other.

At first glance, this seems to reduce the role of comparative justification to the point of insubstantiality. After all, there will hardly ever be a situation where the arguments of both sides have exactly the same weight. However, most hard cases occur because both sides are supported by plausible arguments, and there does not seem to be any rational way of explaining why the arguments supporting one side are to be given more weight than the arguments supporting the other side. In these cases, it seems legitimate to refer to authority-based comparisons. In other words, one need not show that both sides are supported by equally strong arguments in order to be able to use authority-based comparisons. Rather, the burden of showing that the arguments advanced by one side are stronger than the arguments advanced by the other side must be borne by those who, in a given case, question the legitimacy of an authority-based comparison. If the burden of proof is distributed in this way, there is ample space for authority-based comparisons.

A third objection to authority-based comparisons concerns the quality of foreign legal proceedings. One could argue that the legal system in the United States is highly developed and is therefore much better able to guarantee the preconditions for rational discourse than most other legal systems. Hence, by relying on a foreign legal decision, a U.S. court might rely on a legal discourse that is less rational than the discourse over which the referring court presides. In other words, the reference to a foreign court's decision would make the outcome less, not more rational. While this argument has a certain merit,[186] it does not justify the general rejection of authority-based comparisons. Rather, it makes it necessary to confine such comparisons to those countries where legal proceedings meet standards of rationality that are more or less comparable to those in the U.S.

In sum, authority-based comparisons have to meet the following requirements. First, the interpreter has to make a plausible showing that the decision on which he relies deals with the same or an equivalent question and that the decision's reasoning is transferable as well. Second, authority-based comparisons cannot be used to overcome substantive arguments. Third, authority-based comparisons are only legitimate where the interpreter can make a plausible showing that the rationality of the legal discourse underlying the foreign discussion is sufficiently comparable to the rationality of legal proceedings in the U.S.[187]

B. GENERAL OBJECTIONS AGAINST COMPARATIVE REASONING

The question remains whether the discourse-theoretic justification of authority-based comparisons can avoid the general objections to comparative reasoning discussed in Part III.

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186. From a purely theoretical perspective, this argument may not be particularly convincing. After all, it has been shown above that the method of comparative justification cannot be used to overcome substantive arguments. Hence, an interpreter can only make use of comparative justification if neither side can be shown to be supported by stronger substantive arguments than the other. In such a situation, the principle of comparative justification only replaces an arbitrary choice. However, in practice, the situation may be different. In some cases, it may be easier for a court to refer to a foreign decision than to enter into a careful analysis of opposing substantive arguments. Also, the court may be tempted to rely on authority-based comparisons if the perceived differences in the weight of the substantive arguments advanced by both sides are slight. Hence, there is a risk that the practical influence of foreign decisions may well be greater than would be legitimate.

187. It is striking that those legal scholars who advocate the use of comparative law often seem to have in mind only those countries whose legal system meets U.S. standards. *See, e.g.*, Posner, *supra* note 14, at 13 (suggesting that judges should look at legal systems of countries that can be considered "our peers").

The first of the relevant objections was that any use of comparative law in interpretation had to be positively justified. Such a justification has been offered in Part IV.

Second, it was argued that any theory of comparative justification has to either show its compatibility with existing theories of legal interpretation or show them to be wrong. The approach suggested above meets the first one of these two requirements. If authority-based comparisons are used in a purely auxiliary manner, they cannot come into conflict with the traditional theories of legal interpretation.

Third, it was stressed above that a theory of comparative reasoning must be devised in such a way as to avoid a conflict with the principle of democracy. Again, this requirement can be met by assigning authority-based comparisons a purely auxiliary role. If a court relies on such comparisons because substantive arguments fail to decide the case, one cannot claim that the will of the people has been ignored.

This leaves the necessity to solve the problem of consistency. As explained above, this problem results from the fact that it is practically impossible even for the U.S. Supreme Court to refer to all relevant decisions by foreign courts. The question, therefore, is whether the discourse-theoretic justification of authority-based comparisons can explain why it is legitimate to use such comparisons in a selective manner.

It is useful, in this context, to distinguish between the two ways mentioned above in which authority-based comparisons can enhance the rationality of legal discourse, namely by making use of the procedural value of foreign decisions and by introducing additional points of view into a given legal discourse.

With regard to the procedural value of foreign decisions, the problem of consistency does not occur. As shown above, this problem results from the fact that theories of interpretation equate the criteria for identifying the right meaning with the criteria that make a meaning the right one. However, with regard to the functional value of foreign decisions, no such claim is made. In other words, the fact that a certain interpretation corresponds to one chosen by a foreign court indicates that the relevant interpretation is probably the right one, but this correspondence is not what makes the interpretation in question the right one.

As far as the second aspect, namely the introduction of additional views into legal discourse, is concerned, the problem of consistency may seem harder to solve. After all, if what is right is defined via the concept of a rational consensus, then any deficiencies regarding the realization of the discourse rules is likely to result in a decision that is not the right one.

However, as mentioned before, the demanding communicative presuppositions of rational discourse can only be approximately fulfilled in any case.[188] Authority-based comparisons in the context of legal interpretation are only one way of compensating for the factual constraints that govern legal discourses. This way of compensation may not always be practical. However, this is no reason to exclude it on a general basis. Rather, there is no reason not to let the court balance the potential increase in rationality with the practical difficulties of engaging in comparative reasoning on a case-by-case basis.

In sum, the general objections to comparative reasoning identified in Part III do not support the rejection of the discourse-theoretic justification for authority-based comparisons offered in this article.

VI. CONCLUSION

In the context of legal interpretation, comparative law can be used in a variety of ways. The question of legitimacy is a different one for each of these uses.

As long as comparative law is used within the traditional framework of legal interpretation, e.g. as a means of ascertaining legislative intent, there is no need to justify the use of comparative law. Rather, the burden of persuasion is on those who reject the use of comparative law.

By contrast, the situation is a different one when decisions made by foreign courts are per se used as arguments in the context of legal interpretation – a practice referred to as authority-based comparisons. The legitimacy of this form of reasoning needs to be positively established.

This article has argued that the discourse theory of Jürgen Habermas offers a coherent justification for the use of authority-based comparisons.

According to Habermas, a court's decision can only be legitimate if it is based on a rational discourse. In order for a discourse to be completely rational, a variety of conditions have to be met. In particular, the discourse must take place in what Habermas calls an ideal speech situation. Among other things, the ideal speech situation presupposes the absence of all forms of coercion. Moreover, the number of participants must be unlimited. As a practical matter, no legal discourse will ever meet these requirements completely. However, in order for the application of a law to be legitimate, the underlying legal discourse must at least approach the conditions for rational discourse to a sufficient degree.

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188. *See* HABERMAS, FACTS AND NORMS, *supra* note 158, at 234.

Against this background, there are two reasons why courts should resort to authority-based comparisons. The fact that another court has reached the same conclusion indicates that a particular interpretation is the result of a fairly rational discourse. In addition, a court can "artificially" increase the number of participants in the legal discourse underlying its interpretation by considering the decisions of foreign courts.

It has also been shown that there are limits to the legitimate use of authority-based comparisons. In particular, such comparisons are only justified if the foreign decision that is referred to addresses the same or an equivalent legal question. Moreover, it must be established that the legal discourse of the foreign decision in question reaches a standard of rationality that is roughly comparable to that in the United States. Also, authority-based comparisons cannot be used to counter arguments derived from the traditional criteria of legal interpretation. Rather, they can only be used to justify the fact that the substantive arguments advanced by one side are given priority over the substantive arguments advanced by the other side.

Within the limits described above, the use of authority-based comparisons in the context of constitutional and statutory interpretation is legitimate.